

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Time Warner Entertainment-Advance/Newhouse)	
Partnership)	CSR 5712-E
)	
Petition for Determination of Effective)	
Competition in San Marcos, Texas)	

MEMORANDUM OPINION AND ORDER

Adopted: March 12, 2007

Released: March 13, 2007

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Time Warner Entertainment-Advance/Newhouse Partnership ("Time Warner") has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(4) and 76.907 of the Commission's rules seeking a finding of effective competition in San Marcos, Texas ("San Marcos" or the "City").¹ Time Warner alleges that its cable system serving San Marcos is subject to effective competition pursuant to Section 623(a)(2) of the Communications Act of 1934, as amended ("Communications Act"),² and the Commission's implementing rules, and seeks revocation of the certification of the local franchising authority in the community to regulate basic cable service rates. Time Warner claims the presence of effective competition in the community from the competing services provided by Grande Communications, Inc. ("Grande"), a franchised cable operator affiliated with a local exchange carrier ("LEC"), that also provides service to the community.³ There is no opposition to the petition.⁴

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁵ as that term is defined by Section 76.905 of the Commission's rules.⁶ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁷ Based on the record in this proceeding, Time Warner has met this burden.

¹See 47 C.F.R. § 76.7(a)(1) and 76.905(b)(4).

²47 U.S.C. § 543(a)(2).

³47 U.S.C. § 543(a); 47 C.F.R. § 76.905(b)(4).

⁴Grande filed an opposition, however, it was subsequently withdrawn.

⁵47 C.F.R. § 76.906.

⁶47 C.F.R. § 76.905.

⁷See 47 C.F.R. §§ 76.906 & 907.

II. DISCUSSION

3. Section 623(l)(1)(D) of the Communications Act provides that a cable operator is subject to effective competition, and therefore exempt from cable rate regulation, if a LEC or its affiliate offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, provided the video programming services thus offered are comparable to the video programming services provided by the unaffiliated cable operator in that area.⁸

4. The Commission has stated that an incumbent cable operator could satisfy the “LEC” effective competition test by showing that the LEC is technically and actually able to provide services that substantially overlap the incumbent operator’s service in the franchise area.⁹ The incumbent also must show that the LEC intends to build-out its cable system within a reasonable period of time if it has not already done so; that no regulatory, technical or other impediments to household service exist; that the LEC is marketing its services so that potential customers are aware that the LEC’s services may be purchased; that the LEC has actually begun to provide services; the extent of such services; the ease with which service may be expanded; and the expected date for completion of construction in the franchise area.¹⁰

5. Time Warner operates a cable television system in San Marcos, Texas for which it seeks a determination of effective competition. Time Warner has provided information demonstrating that Grande Communications Network, Inc., a wholly owned subsidiary of Grande, is a telephone company that provides local exchange and other telephone services within San Marcos.¹¹ Therefore, Grande’s wholly owned subsidiary Grande Communications Network, Inc. qualifies as a LEC, and Grande qualifies as an affiliate of a LEC for purposes of the LEC effective competition test.¹²

6. In addition to qualifying as a LEC, Grande was awarded a nonexclusive local cable franchise from San Marcos to provide cable service throughout San Marcos commencing on June 20, 2000.¹³ Grande is required to make cable service available to 25 percent of the residents by June 1, 2003, 50 percent of the residents by June 1, 2004, and every city resident by June 1, 2005.¹⁴ Grande has distributed marketing materials targeted to San Marcos residents informing them that they need only contact Grande for installation of its cable services.¹⁵

7. Grande’s marketing materials show that its cable system offers over 100 channels of video programming that includes non-broadcast programming services such as A&E, CNN, Discovery Channel,

⁸Communications Act, § 623(l)(1)(D), 47 U.S.C. § 543(l)(1)(D); *see also* 47 C.F.R. § 76.905(b)(4). This fourth statutory effective competition test within Section 632(l) may be referred to as the “LEC” effective competition test.

⁹*See Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305 (1999) (“*Cable Reform Order*”).

¹⁰*Id.*

¹¹*Id.*

¹²*See* 47 U.S.C. § 543(l)(1)(D); 47 U.S.C. § 153(a)(1).

¹³Time Warner Petition at 6 and Exhibit B.

¹⁴*Id.* at 4-5 and Exhibit C at 3.

¹⁵*Id.* at 6-7 and Exhibit A.

HBO and Showtime, as well as a complement of over seven local television broadcast stations.¹⁶ This complement of programming services compares closely with the programming available on Time Warner's systems.¹⁷ Therefore, Grande provides comparable programming as required by the "LEC" effective competition test.¹⁸

8. In December 2005, the Commission requested that the parties update the record.¹⁹ In response, Time Warner filed a Supplement and Further Supplement.

9. Time Warner's Supplement argues that Grande's competitive viability remains strong as evidenced by its financial prosperity and continued expansion and purchase of related entities.²⁰ Time Warner cites various public filings to buttress its claim that Grande continues to be financially viable and continues to expand.²¹ According to Time Warner, Grande has 134,919 customers in 48 communities.²² Grande currently passes 328,041 marketable homes throughout Texas, which represents a 9 percent increase, and has increased the number of customers served by 11 percent, with cable subscribership increasing by 7.5 percent.²³ Time Warner further notes that Grande continues to offer multichannel video and full service telephone service in San Marcos that bundles local and long distance service at a discounted rate.²⁴ Time Warner notes that in 2006 Grande converted its city-issued cable franchise into a state-issued Certificate of Authority under Texas' recently adopted State-Issued Certificate of Authority statute.²⁵ Grande has publicly reported 113,700 telephone subscribers throughout all of its systems.²⁶ Time Warner alleges that these services offered by Grande operate in direct competition with its own services. Thus, all evidence indicates that Grande continues to have a significant and growing number of video subscribers in the San Marcos franchise area.

10. Time Warner's Further Supplement indicates that it researched the current state of Grande's build-out of its San Marcos system.²⁷ The research included a physical plant inspection, engineering review, and the creation of a detailed map by Time Warner's local personnel in San Marcos.

¹⁶*Id.* at 7-8 and Exhibit A.

¹⁷*Compare id.* and Time Warner Petition at 7-8 and Exhibit A and E.

¹⁸*See* 47 C.F.R. § 76.905(g).

¹⁹December 13, 2005 Letter from Steven A. Broecker, Deputy Chief, Policy Division, Media Bureau to Arthur H. Harding of Fleischman and Walsh, L.L.P., counsel for Time Warner, et al.

²⁰Time Warner Supplement at 3-5.

²¹*Id.* Grande's operations, as reflected in publicly filed documents with the Securities and Exchange Commission, reflect strong growth and financial stability based on revenues, earnings, and Grande's projection of continuous rapid growth. Furthermore, Grande has been able to obtain financing to allow it to continue to grow as evidenced by its acquisition of U.S. Online Inc., an MDU-focused MVPD with subscribers in San Marcos and San Antonio in 2001 and over-builder ClearSource, Inc., with operations throughout Texas. In 2003, Grande purchased 3000 miles of fiber spanning Texas, Oklahoma, Arkansas, and Louisiana from San Marcos-based C3 Communications.

²²*Id.* at 3.

²³*Id.* at 3-4.

²⁴*Id.*

²⁵*Id.* at 5.

²⁶*Id.* at 6.

²⁷Further Supplement at 1-2.

Time Warner provided a map of the City limits and highlighted Grande's system build-out as well as portions of the City under construction by Grande.²⁸ According to Time Warner, Grande now serves "approximately ninety percent of the overall municipal territory of San Marcos, with construction into other parts of the city ongoing."²⁹

11. Finally, Time Warner argues that in addition to Grande, MVPD competition is provided by DBS providers, DirecTV and DISH Network.³⁰ Time Warner requested and received zip code, occupied household and DBS subscriber data from Media Business Corp. for the City and DBS subscriber data from the Satellite Broadcasting and Communication Association.³¹ Using this data, Time Warner applied the five-digit zip code allocation formula previously approved by the Commission and the evidence indicated that DBS providers serve 9.67 percent of the total households in San Marcos. Time Warner therefore argues that the combination of DBS and Grande subscribers reflect that 61.33 percent of San Marcos households subscribe to an MVPD other than Time Warner.³² Thus, Time Warner argues that it is arguably also subject to competing provider effective competition in San Marcos.

12. When the petition was filed, Grande offered service to 90 households. Since that time, however, Grande has continued to expand the number of subscribers and made major improvements to its system to compete with the other multichannel video programming distributors serving San Marcos. Although the map submitted by Time Warner is useful in documenting Grande's build-out, we are unable to verify the ninety percent build-out number asserted by Time Warner. The map is, however, evidence that supports Time Warner's argument that Grande continues to build-out its system and add subscribers. Time Warner has also produced evidence to indicate that Grande remains on a solid financial footing. We believe that Time Warner has satisfied its burden of demonstrating that Grande's service is "offered" in the San Marcos franchise area consistent with the LEC effective competition test. In addition, Time Warner has presented evidence that there are at least 1,223 DBS subscribers in the City. This is additional evidence that San Marcos residents have a growing choice among multichannel video programming distributors.

13. Time Warner demonstrated that Grande has commenced providing cable service within San Marcos, has marketed its services in a manner that makes potential subscribers reasonably aware of its services, and otherwise satisfies the LEC effective competition test consistent with the evidentiary requirements set forth in the *Cable Reform Order*.³³ Based on the foregoing, we conclude that Time Warner has submitted sufficient evidence demonstrating that its cable system serving San Marcos, Texas is subject to LEC effective competition.

III. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed by Time Warner Entertainment-Advance/Newhouse Partnership **IS GRANTED**.

²⁸*Id.*

²⁹*Id.*

³⁰Time Warner Supplement at 8-9.

³¹*Id.*

³²*Id.* at 9.

³³14 FCC Rcd at 5305.

15. **IT IS FURTHER ORDERED** that the certification of the City of San Marcos to regulate basic cable service rates of Time Warner Entertainment-Advance/Newhouse Partnership **IS REVOKED**.

16. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.³⁴

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division, Media Bureau

³⁴47 C.F.R. §0.283.